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MICHAEL RODAK, JR.

In the
Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1103

ROCCO MEMMOLO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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UNITED STATES OF AMERICA,
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Opinion Below.

The Court below rendered no opinion with its order (App. A).

Jurisdiction.

The order of the Court below was entered on October 17, 1973 (App. A). The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

Question Presented.

Does a Circuit Court of Appeals have jurisdiction to review a denial of a motion to inspect intercepted wire communications and the application and order therefor under 18 U.S.C. 2518(8)(d) where no criminal proceedings are pending?

Statutes.

Amendments IV and V of the Constitution of the United States
18 U.S.C. 2515
18 U.S.C. 2518(8)(d)
18 U.S.C. 2518(9)
18 U.S.C. 2518(10)(a)

Statement.

Petitioner, on August 24, 1973, received an inventory of intercepted wire communications made pursuant to an order on May 18, 1973 by a Judge of the United States District Court for the District of Massachusetts (App. B).

Prior to the receipt of said inventory, on August 9, 1973, a United States Magistrate issued a search warrant for the premises at 86 Washington Street, Chelsea, Massachusetts, and on said date, August 9, 1973, a search was made of said premises.

Petitioner was upon said premises at the time of the search and was searched against his will and his property taken. Petitioner was not arrested.

The search warrant, Petitioner contends, did not authorize a search of his person, only the premises (App. C).

The Petitioner was not named in the order authorizing the wire communication interception.

The Petitioner was not named in the affidavit in support of said search warrant.

The affidavit in support of said search warrant was based in part on wire communication interceptions obtained as a result of the above order authorizing the same.

There are no criminal proceedings pending against the Petitioner, nor has he been summonsed to appear before a grand jury.

Petitioner filed a motion under 18 U.S.C. 2518(8)(d) to inspect the order, application, and wire communication interceptions.

The motion was denied (App. D).

Petitioner appealed to the United States Court of Appeals for the First Circuit. The appeal was dismissed for lack of appellate jurisdiction (App. A).

Reasons for Granting Writ.

The Petitioner was named as a party to intercepted wire communications pursuant to 18 U.S.C. 2518(8)(d) when he received the inventory, although he was not named in the order.

His property was taken from him as a result of an unlawful search of his person.

Since he was not named in the affidavit in support of the search warrant which was based on said wire communication interceptions, he became a party thereto *as a result of the search and seizure and his mere presence on the premises.*

In order to assert his rights under the Fourth and Fifth Amendments, he has moved to inspect the intercepted

communications and the legal authority authorizing the same.

The District Court has refused to permit this at this time, and the Circuit Court has ruled it lacks jurisdiction to review this decision.

Petitioner contends that the decision of the District Court is reviewable, as the statutes grant the Petitioner:

1. the right to prevent the use before the grand jury; 18 U.S.C. 2515;
2. the right to sue for damages for illegal wire interceptions; and
3. the right to suppress evidence illegally obtained; 18 U.S.C. 2518(10)(a).

If the Government does not proceed criminally against the Petitioner, his only recourse to assert these rights is through the instant motion.

The denial of such a motion should be subject to review, as it is a final order of the District Court.

Lapides v. *United States,* 215 F.2d 253 (2 Cir. 1954).

Furthermore, the Circuit Court of Appeals for the Fifth Circuit has taken jurisdiction to review the denial of a similar motion in the case of Petition of Earl Leppo In Re: *United States* v. *Martin Sklaroff,* #73-3316.

The decision in this case is important to determine the rights of those persons not named in wire communication interception orders whose communications are intercepted.

Conclusion.

Petitioner contends that the denial of his motion was a final judgment of the District Court which was review-

able by the Court of Appeals for the First Circuit, and that the denial of such review denies to him his rights as secured by the Fourth and Fifth Amendments.

For the reasons here and above set forth, the Petitioner submits that this Petition For a Writ of Certiorari should be granted.

By His Attorneys,
MARTIN K. LEPPO
294 Washington Street
Boston, Massachusetts 02108

MICHAEL A. PARIS
294 Washington Street
Boston, Massachusetts 02108

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 73-8063.

ROCCO MEMMOLO,
Petitioner, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

ORDER OF COURT
Entered: October 17, 1973

Upon review of the record on appeal herein,

It is ordered that the appeal be, and the same hereby is, dismissed for lack of appellate jurisdiction.

By the Court,
(s) DANA H. GALLUP
Clerk.

APPENDIX B

[SEAL]

[LETTERHEAD — UNITED STATES DEPARTMENT OF JUSTICE]

GEM:GFK:mpm

August 23, 1973

Mr. Rocco Memmolo
c/o Martin K. Leppo, Esquire
40 Court Street
Boston, Massachusetts

Dear Sir:

In accordance with the Order of United States District Judge Frank Freedman and in accordance with the provisions of Title 18, United States Code, Section 2518(8)(d), you are hereby notified:

(1) That on May 18, 1973 United States District Judge Frank Freedman entered an Order authorizing the interception of wire communications over telephone numbered 289-8634 listed to Vincent Luongo, 20 Beach Road, Revere, Massachusetts and telephone numbered 284-2815 listed to Rubina Luongo, 20 Beach Road, Revere, Massachusetts, between the hours of 12:00 noon and 5:00 p.m., daily, for a period of fifteen days, and that during the period from May 25, 1973 to May 26, 1973, wire communications were intercepted.

(2) On May 18, 1973 United States District Judge Frank Freedman entered an Order authorizing the installation of a mechanical device, called a "pen register", on the telephones referred to above, and that during the same period of time stated above, such device was in fact in use.

Very truly yours,
GERALD E. MCDOWELL
Attorney in Charge
By:
GEORGE F. KELLY
GEORGE F. KELLY
Special Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Magistrate's Docket No.
Case No.

UNITED STATES OF AMERICA

v.

PREMISES KNOWN AS 86 WASH. ST., CHELSEA, MASS., DESCRIBED AS THIRD FLOOR OF A THREE STORY BRICK BUILDING NUMBERED 86 ON LEFT SIDE DOOR LEADING UPSTAIRS AND NUMBERED 86 ON RIGHT HAND DOOR LEADING TO AMERICAN JUDAEAN CREDIT UNION ON THE FIRST FLOOR, SEE PHOTOGRAPH ATTACHED, AND ALL PERSONS IN SAID PREMISES

SEARCH WARRANT

To: ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION:

Affidavits having been made before me by Special Agent James H. Vaules, Jr., Federal Bureau of Investigation, Boston, Massachusetts, that he has reason to believe that on the premises known as third floor of a three story brick building numbered 86 on left side door leading upstairs and numbered 86 on right hand door leading to American Judaean Credit Union on the first floor, see photograph attached, and all persons in said premises, in the District of Massachusetts, there is now being concealed certain property, namely, wagering paraphernalia relating to the operation of a gambling business consisting of, but not limited to, bookkeeping records, accounting sheets, tabulation sheets, rundown sheets, betting slips, line sheets, ledger books, ledger sheets, line notations, financial state-

ments, checks, check stubs, money orders, receipts, I.O.U.'s, United States Currency, telephone number address books, notebooks, and other gambling paraphernalia, which are designed or intended for use or which have been used as a means of committing a criminal offense, are the fruits of such offense and constitute evidence of such criminal offense, in violation of the laws of the United States; such criminal offense being the conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business; in violation of Title 18, United States Code, Sections 1955 and 371 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 9th day of August, 1973.

A true copy attest:

(s) WILLIE J. DAVIS
WILLIE J. DAVIS
U.S. Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROCCO MEMMOLO

v.

UNITED STATES OF AMERICA

For USA:
GEORGE F. KELLY, ESQ.
1703 POCH
Boston, Mass.

For Petitioner:
RICHARD H. GENS, ESQ.
MARTIN K. LEPPO, ESQ.
294 Washington Street
Boston, Mass. 02109

Aug. 27 Motion for inspection of intercepted wire communications, applications and orders under Title 18, §2518(8)(d), filed.

Oct. 5 FREEDMAN, J. Hearing on pltf's motion for inspection of intercepted wire communications; deft's exhibit impounded; arguments; pltf's brief filed. After hearing and consideration of motion for inspection the court denies said application and as a reason therefore: petition premature; pltf has not yet appeared before the grand jury, and allowing inspection at this time might violate grand jury secrecy. Objection by pltf is noted by the court.

9 Petitioner's Notice of Appeals filed. Cpy to George Kelly Esq.

10 Certified copy of docket entries and original pleadings delivered to the Court of Appeals.

I hereby attest and certify on 10-10-73, that the foregoing document is a true and correct copy of the original on file in my office and in my legal custody.

GEORGE F. MCGRATH
Clerk, U.S. District Court
District of Massachusetts
By:
A. R. FITZGERALD
Deputy

APPENDIX E

CONSTITUTION

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

"The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State Court unless each party, not less than 10 days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved."

§2518 (8) (d)

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

§2518 (10) (a)

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1103

ROCCO MEMMOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioner, who was not indicted, contends that the court of appeals should have reviewed the district court's denial of his motion to inspect his intercepted communications, the order authorizing the interception, and the application therefor.

Petitioner's telephone conversations were overheard and recorded pursuant to a court authorized wiretap of one Vincent Luongo on May 25 and 26, 1973. On August 23, 1973, petitioner was notified of the interception pursuant to the requirements of 18 U.S.C. 2518(8)(d). On August 27, petitioner filed a motion in the United States District Court for the District of Massachusetts under 18 U.S.C. 2518(8)(d) to inspect the intercepted conversations, the application and the order authorizing the interception. Petitioner was not then under indictment, and had not been called to testify

before the grand jury which was considering matters involved in the telephone interception. The United States District Court for the District of Massachusetts denied the motion as premature, since allowing inspection before petitioner appeared before the grand jury might violate grand jury secrecy (Pet. App. D). The court of appeals dismissed the appeal for lack of appellate jurisdiction (Pet. App. A).

Petitioner contends that the district court's denial of his motion for inspection was a final order, subject to review by the court of appeals. This Court need not reach that question, however. In the circumstances, the district court's action was so plainly not an abuse of its discretion under 18 U.S.C. 2518(8)(d) that review by the court of appeals could not have benefited the petitioner.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, *et seq.* (18 U.S.C. 2510-2520) sets forth a comprehensive scheme for regulating court-authorized wire interceptions. Provisions are made for post-interception notice and disclosure of certain information concerning the wire interception under certain limited circumstances. Basically, the statute requires that notice of the fact of the wire interception be provided to the named subject and to such other parties to the intercepted communications as the issuing judge directs; on motion the court may, in its discretion, permit the persons so notified to inspect such portions of the intercepted communications, orders, and applications as it determines to be in the interest of justice (18 U.S.C. 2518(8)(d)). Prior to disclosure of any information from the wire interception in any adversary proceeding, the parties to the proceeding must receive copies of the application and court order, whether or not they have previously received the inventory notice (18 U.S.C.

2518(9)). Any aggrieved person in such an adversary proceeding may bring a motion to suppress information from the wire interception, and he may then, in the judge's discretion, be granted discovery of portions of the intercepted communications (18 U.S.C. 2518(10)(a)).

Petitioner was not entitled to disclosure of any of the information specified in his motion. It is clear from 18 U.S.C. 2518(8)(d) and 2518(10) that the disclosure of portions of the intercepted conversations themselves is always made subject to the district court's determination that such disclosure would serve the interests of justice. The court here concluded that it would not order such disclosure, on the ground that disclosure before petitioner appeared before the grand jury might violate grand jury secrecy (Pet. App. 10). This refusal to interfere with the functions of the grand jury was a proper exercise of the court's discretion and served the interests of justice.

A party to any "trial, hearing, or other proceeding in a Federal or State court" in which any intercepted communication or evidence derived therefrom is to be introduced in evidence is entitled to a copy of the application and court order authorizing the interception not less than 10 days before the proceeding. 18 U.S.C. 2518(9). But petitioner had no right to the application or order under Section 2518(10), since he was not under indictment, and no information derived from the interception was being offered in evidence in any trial, hearing, or other proceeding involving him.

Petitioner did face the possibility that he would be called before the grand jury considering matters relating to the interception and he alleges that information from the interception was used in the application for a search warrant. Neither of these uses of evidence de-

rived from the interception, however, would give petitioner the right to a copy of the application and order under 18 U.S.C. 2518(10). That Section applies to adversary type hearings, and does not include a grand jury hearing (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 105). Since an application to a magistrate for a search warrant is not an adversary hearing, the use of evidence derived from an interception in such an application does not require disclosure under 18 U.S.C. 2518(10).

In sum, the district court's denial of petitioner's motion to inspect the order, application and intercepted communications before he was indicted or even called before the grand jury was a proper exercise of the court's discretion, and no further review is required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

DOJ-1974-04